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No. 92-1945

In The

Supreme Court of the United States

October Term, 1992

THE PITTSTON COMPANY, et al.,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF BIG STAR COAL COMPANY, BLUE CHIP COAL CORP., DOSS FORK COAL CO., INC., IVY BRANCH COAL COMPANY, INCORPORATED, LETA'S TRUCKING CO., INC., McKINNEY TRUCKING CO., INC., MULLINS & STANLEY TRUCKING COMPANY, INC., MULLINS ENTERPRISES, INC. OF VA, PATTY CHANDLER TRUCKING, INC., RIGHT FORK COAL CO., INC., SAN-WEST COAL CO., INC., AND STONEY FIELDS TRUCKING, INC., AS AMICI CURIAE IN SUPPORT OF PETITION

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INDEX

STATEMENT OF INTEREST 2

REASONS FOR GRANTING THE WRIT

I. This Court Should Expressly Adopt the Doctrine of Judicial Estoppel for the Federal Courts 4

II. Employers' Right to Select Their Own Bargaining Representatives Should Not be Abridged .. 7

III. In Granting Summary Judgment the Court Below Effectively Reversed the Parties' Burdens Under Rule 56 9

CONCLUSION 12

TABLE OF CASES

Page

Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982) 6

American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528 (11th Cir. 1983) 6

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 9

Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990) 6

Blonder-Tongue Lab. Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971) 7

Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982) 8

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991) 6

Davis v. Wakelee, 156 U.S. 680 (1895) 5, 6

District 29, United Mine Workers v. Royal Coal Co., 768 F.2d 588 (4th Cir. 1985) 8

Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982) 6

General Elec. Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969) 8

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 5

Illinois v. Campbell, 329 U.S. 362 (1946) 5

In re United Mine Workers Employee Benefit Plan Litig., 782 F.Supp. 658 (D.D.C. 1992) 5

TABLE OF CASES – Continued

Page

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 8

Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703 (9th Cir. 1990) 6

NLRB v. Sklar, 316 F.2d 145 (6th Cir. 1963) 8

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 7

United Mine Workers 1974 Pension Trust v. Big Star Coal Co., Civil Action No. 93-0031-A (W.D. Va.) 4

United Mine Workers 1974 Pension Trust v. Pittston Co., 984 F.2d 469 (D.C. Cir. 1993) 5, 6

United Mine Workers 1974 Pension Trust v. Pittston Co., 793 F.Supp. 339 (D.D.C. 1992) 5

Water Technologies Corp. v. Calco, Ltd., 850 F.2d 665 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988) 6

Young v. United States Dep't of Justice, 882 F.2d 633 (2d Cir. 1989), *cert. denied*, 110 U.S. 1116 (1990) 6

TABLE OF STATUTES AND RULES

29 U.S.C. § 158(b) 8

Fed. R. Civ. P. 56 ..... 9, 10, 11, 12

OTHER AUTHORITIES

Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409 (1987) 6

Douglas W. Henkin, Comment, *Judicial Estoppel-Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991) 6

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981) 6

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Pursuant to Supreme Court Rule 37, Big Star Coal Company, Blue Chip Coal Corp., Doss Fork Coal Co., Inc., Ivy Branch Coal Company, Incorporated, Leta's Trucking Co., Inc., McKinney Trucking Co., Inc., Mullins & Stanley Trucking Company, Inc., Mullins Enterprises, Inc. of VA, Patty Chandler Trucking, Inc., Right Fork Coal Co., Inc.,

San-West Coal Co., Inc., and Stoney Fields Trucking, Inc., respectfully submit this brief as Amici Curiae in support of the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia. This brief is filed with the consent of the parties.

STATEMENT OF INTEREST

Amicus companies are small, locally owned businesses performing contract mining or trucking services for other, larger coal companies. In the language of the industry, the amicus companies are known as "contractors." If a contractor works for a company whose employees are represented by the United Mine Workers, the contractor's employees are also usually represented by the union.

When the larger coal companies negotiate and sign new collective bargaining agreements with the union, their contractors sometimes follow suit, executing what are known as "me too" agreements. On some occasions, however, contractors are able to negotiate financial concessions and terms that the union may be unwilling to make with larger companies. These concessions and terms may be necessary for the contractor to continue to operate and maintain employment.

The Bituminous Coal Operators Association (BCOA) and the United Mine Workers of America (UMWA) negotiated National Bituminous Coal Wage Agreements (NBCWAs) in 1978, 1981, and 1984. These agreements were made for stated durations and have now expired.

The agreements incorporated by reference the UMWA pension and benefit trusts and specified certain contribution rates by employers. While the amicus contractors were not members of the BCOA, the companies that employed them were, and the contractors signed NBCWAs in one or more of the years in question.

The respondent UMWA Funds assert that a provision in the trust agreements – now conveniently called the "evergreen" clause – obligates employers to continue to pay into the Funds notwithstanding termination of the collective bargaining agreements signed by them. The amicus contractors were unaware of any such obligation when they signed their collective bargaining agreements with the union. In fact, the contractors never heard of the "evergreen" clause or any other theory of perpetual liability until this controversy arose ten years after the provision in question originated. (See affidavits appended to this brief.)

According to the respondent Funds, and the D.C. Circuit, once a company signed a NBCWA it became obligated to pay into the Funds for the duration of that agreement *and* any subsequent NBCWA. Under this reasoning, the contractors face previously unimagined liability which they are powerless to control. Although the 1978, 1981, and 1984 agreements signed by the contractors have expired, the Funds and D.C. Circuit would require continued contributions based on rates specified in subsequent agreements negotiated between the BCOA and the union – so long as there is such an agreement. Thus, for as long as they choose, the BCOA and the union can control contributions from everyone who signed a NBCWA in 1978 or later.

Part of the respondent Funds' claims against the petitioners and the amicus contractors is for contributions to the UMWA 1950 pension and benefit trusts. Several of the amicus companies never had any employees who will be eligible for benefits from these trusts. The UMWA gave four or more of the amicus contractors express written waivers of any obligation to contribute to the 1950 trusts. The respondent Funds maintain that these waivers are invalid and that the UMWA cannot alter the perpetual "evergreen" obligation.

The contractors, along with other companies in the industry, are therefore vitally interested in the outcome of this case given its potential application to them. The contractors have already been sued by the respondent Funds in the Western District of Virginia on the same "evergreen" theory used against Pittston and Rawl. *United Mine Workers 1974 Pension Trust v. Big Star Coal Co.*, Civil Action No. 93-0031-A. The Funds have requested the Judicial Panel of Multidistrict Litigation to transfer the Virginia case to the District of Columbia. If the case is transferred, the amicus contractors will find themselves before the same courts that entered and affirmed summary judgment against Pittston and Rawl.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXPRESSLY ADOPT THE DOCTRINE OF JUDICIAL ESTOPPEL FOR THE FEDERAL COURTS.

The issue in this case bearing perhaps the greatest significance for civil litigation in the federal courts was

largely ignored by the courts below: *Does the doctrine of judicial estoppel prevent a litigant in the federal system from advancing successive, mutually contradictory positions against different parties in different cases?* In a paragraph, the court of appeals declined to adopt the doctrine and concluded it was unnecessary even to "seriously consider" the issue in this case. *United Mine Workers 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir. 1993), *aff'g* 782 F. Supp. 658, *reconsid. denied*, 793 F. Supp. 339 (D.D.C. 1992).

The issue should be seriously considered. Civil litigation continues to flood the federal courts. The Court should carefully weigh any reasonable measure that will check the filing of successive, contradictory lawsuits. Such cases not only drain scarce judicial resourses, they also diminish the integrity of the legal system as a whole. If adopted, the doctrine of judicial estoppel will prevent this unnecessary and unfair burden on the courts and opposing parties.

Judicial estoppel generally operates to prevent a party from assuming contradictory positions in successive legal proceedings. "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Beyond this, the Court has elaborated little. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975); *Illinois v. Campbell*, 329 U.S. 362, 369 (1946).

Despite this Court's statement in *Davis v. Wakelee*, there is, as Pittston notes in its petition, a conflict among the circuits as to whether judicial estoppel should be recognized and applied in the federal courts. *Compare Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547-48 (7th Cir. 1990); *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 716 (9th Cir. 1990); *Young v. United States Dep't of Justice*, 882 F.2d 633, 639-640 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988); *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *with United Mine Workers 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991).

Although judicial estoppel is recognized in one form or another in most circuits and states, the courts disagree on the precise elements of the doctrine. *See* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (1981); Douglas W. Henkin Comment, *Judicial Estoppel-Beating Shields Into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991); Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409 (1987). Differences exist, for example, on whether the party against whom estoppel is asserted must have been successful in the prior litigation, whether the party asserting the doctrine must have been a party or in privity with a party to the earlier litigation,

and whether that party must show some type of detrimental reliance or prejudice from the prior case or bad faith on the part of his opponent. *Id.*

In this case, the respondent Funds systematically, repeatedly, and successfully advanced a legal position that is irreconcilable with that now asserted against Pittston, Rawl, and the amicus contractors. Specifically, in numerous cases over a period of ten years after the "evergreen" clause was incorporated in the trust documents, the Funds imposed pension withdrawal liability on employers whose NBCWAs expired, representing to the courts that the employers no longer had an obligation to contribute to the Funds – a prerequisite to establishing liability against those employers. See Pittston's petition at pp. 6-8. The Funds now represent that the "evergreen" clause clearly imposes continuing contribution liability on employers beyond expiration of their contracts.

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court defined the parameters of collateral estoppel, resolving decades of debate about the scope of the doctrine. This case presents a corresponding opportunity for the Court to define the role of judicial estoppel in the federal courts and determine the limits on repetitive, inconsistent litigation.

II. EMPLOYERS' RIGHT TO SELECT THEIR OWN BARGAINING REPRESENTATIVES SHOULD NOT BE ABRIDGED

The amicus contractors are not, and never have been, members of the BCOA – the employer association that

negotiated the 1978, 1981, and 1984 NBCWAs in dispute. Yet, under the reasoning of the D.C. Circuit, by signing similar agreements, the contractors irrevocably committed themselves to make whatever future pension and benefit contributions the BCOA and UMWA decide they should make. Thus, while the BCOA can continue to negotiate and control its own contributions – and refuse to sign any agreement not acceptable to it – the contractors have forever relinquished that right. Paradoxically, the BCOA and the contractors signed the same agreement, yet the BCOA can decide what it pays and the contractors cannot.

All employers should be free to determine who their representatives will be in labor negotiations. *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); 29 U.S.C. § 158(b). Certainly, employers should not permanently lose that right by inference or construction of ambiguous contract provisions. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Yet, that is what has happened to Pittston and Rawl, and that is what is threatened against the contractors.

Joining a voluntary employer association is not a lifetime commitment. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982); *NLRB v. Sklar*, 316 F.2d 145 (6th Cir. 1963). And signing a three-year national contract does not foreclose future collective bargaining. *See District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985).

The decision below not only takes away petitioners' right to negotiate on a critical issue, it gives that right to the BCOA, an association of competing companies. Thus,

a handful of the most powerful companies can dictate the terms of the collective bargaining agreements for hundreds of smaller companies that signed contracts not knowing that they were giving up any future bargaining rights. This is wrong and unfair and should be overturned.

III. IN GRANTING SUMMARY JUDGMENT THE COURT BELOW EFFECTIVELY REVERSED THE PARTIES' BURDENS UNDER RULE 56.

A non-moving party whose opponent bears the burden of proof on an issue occupies a most-favored position under Rule 56. In order to successfully resist his opponent's motion, the non-moving party does not have to present any evidence. He has only to point out that there are holes in his opponent's case. It is the moving party's burden to show "that there is *no* genuine issue as to *any* material fact and that the moving party is entitled to judgment *as a matter of law*." Fed. R. Civ. P. 56(c) (emphasis added). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Instead of following these principles, the courts below silently reversed them, reconciling inconsistencies and ambiguities in the movant respondents' case, and concluding that the evidence of the nonmovant petitioners "fell short" of what the courts thought was necessary to "substantiate" the petitioners' claims. This can be demonstrated directly from the opinions:

- The district court found that the "evergreen" clause was ambiguous and proceeded to consider extrinsic evidence. 782 F. Supp. 658, 664.

The court went on to enter summary judgment for the Funds on the ground that their evidence was "voluminous and persuasive." Under Rule 56, the "volume" or "persuasiveness" of the Funds' evidence should have been of no concern to the court. Regardless of the weight of the Funds' evidence, Rule 56 required that the motion be denied if there were any genuine issues of material fact – which there surely were.

– The petitioners showed that one of the participants in the negotiations that lead to the "evergreen" clause made a prior statement inconsistent with the Funds' present interpretation of the provision. 782 F. Supp. at 666-67. While the district court "confesse[d] to a great deal of confusion over the import of [this] statement," the court was "persuaded" by a subsequent statement from the witness that the clause was intended to create a continuing obligation. 782 F. Supp. at 667. Again, the question under Rule 56 was not which statement was more persuasive but whether the inconsistency created an issue of material fact.

– The petitioners showed that the Trust Funds took the position in other litigation – directly contrary to their position here – that an employer's obligation to contribute terminated upon expiration of his collective bargaining agreement. 782 F. Supp. at 672-74. In response, the district court said: "Although the Court considers the Trusts' contradictory positions to be some evidence that the "evergreen" clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly outweighed by the other evidence before the Court." 782 F. Supp. at 674.

Under Rule 56, this finding compelled that the Funds' motions for summary judgment be denied, not granted.

– In dismissing the evidence of inconsistent conduct on the part of the Funds, the district court said it could "only speculate" that such conduct "may have been the result of a lack of communication between the attorneys filing the complaints and the trustees themselves." 782 F. Supp. at 674. Under Rule 56, the court was required to draw all reasonable inferences in favor of the nonmoving party, not to speculate in favor of the moving party.

– The court of appeals suggested that the contract and trust agreements were unambiguous but proceeded to consider extrinsic evidence, including declarations of what was intended, even though such evidence should not have been admissible if the contract were truly unambiguous. 984 F.2d at 473-74.

– The court of appeals found the petitioners' arguments as to the meaning of the "evergreen" clause to be "counterintuitive" and "unconvincing." 984 F.2d at 475. Again, these conclusions go to the weight of the evidence, not the existence of disputed facts.

– The court of appeals said that "the Coal Companies provided no extrinsic evidence to substantiate the reasonableness of their interpretation." 984 F.2d at 475. As parties not having the burden of proof and opposing summary judgment, the companies had no burden to produce any evidence "to substantiate" their position.

– In passing on the evidence of the Funds' inconsistent conduct, the court of appeals said:

> "We will not infer that the Trustees previously had a different interpretation of the clause simply because they made a rational business decision to sue under an alternative theory when certain employers failed to pay into the funds." 984 F.2d at 475. First, the Funds never contended that there was any "rational" business purpose behind their prior withdrawal liability suits. In fact, the Funds conceded that "their positions in the withdrawal liability cases and their position in these cases are logically inconsistent." Brief of Appellees in Court of Appeals at 46. Second, the court was not free to "rationalize" the Funds' conduct and draw inferences in their favor. To the contrary, under Rule 56, the court's obligation was to accept the inconsistency and draw all reasonable inferences in the petitioners' favor, chiefly, that the "evergreen" clause may not mean what the Funds now say it means.

Rule 56 does not, and was never intended to, take the place of trial. The nonmoving party who has no burden of proof on the issue does not have to convince or persuade the court of anything. Rather, he can confidently resist summary judgment on the failure of his opponent to demonstrate the absence of any material factual issues. The courts below lost sight of these basic principles. Certiorari should be granted. Rule 56 is too important to practice in the federal courts to be so misinterpreted and misapplied.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Mullins & Stanley Trucking
Company, Inc.,
Mullins Enterprises, Inc. of VA,
Patty Chandler Trucking, Inc.,
Right Fork Coal Co., Inc.,
San-West Coal Co., Inc., and
Stoney Fields Trucking, Inc.

June 11, 1993

APPENDIX

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF STONEY F. FIELDS

Stoney F. Fields, first being duly sworn, deposes and states as follows:

1. I am Stoney F. Fields and reside at Route 1, Box 380, Haysi, Virginia 24256.

2. I am vice-president and general manager of Stoney Fields Trucking, Inc., a Virginia corporation.

3. Stoney Fields Trucking is engaged in the business of transporting coal by trucks from mine sites to preparation plants in Southwest Virginia.

4. Currently, Stoney Fields Trucking owns three trucks and has two employees – me and my son. My wife, Eurabell, is president of the corporation.

5. Stoney Fields Trucking has not had any contract with the United Mine Workers since the 1984 contract expired in 1988.

6. Stoney Fields Trucking has never made any contracts with the United Mine Workers in Washington, D.C., nor spoken to anyone in Washington, D.C. about such contracts.

7. Stoney Fields Trucking made its contracts with the union in Southwest Virginia.

8. Stoney Fields Trucking does not do any business in Washington, D.C.

9. I never heard of any "evergreen" clause or liability until this suit was filed. I thought that a company's obligation to contribute to the funds expired when the contract expired.

/s/ Stoney F. Fields
Stoney F. Fields

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Stoney F. Fields.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF FREDDIE R. LINKOUS

Freddie R. Linkous, first being duly sworn, deposes and states as follows:

1. I am Freddie R. Linkous and reside at Route 3, Box 510C, Clintwood, Virginia 24228.

2. I am president of Leta's Trucking Company, Inc., a Virginia corporation.

3. Leta's is engaged in the business of trucking coal from mines to preparation plants in Southwest Virginia.

4. Leta's does not conduct any business in the District of Columbia or any state except Virginia.

5. The last contract Leta's had with the United Mine Workers expired in 1988. When the strike began in 1989, Leta's had four employees represented by the union. Since the strike, Leta's has had no employees represented by the union.

6. When Leta's last contract expired in 1988, I did not think the company had any further obligation to make contributions to trust funds. I thought that when

the contract expired any obligation to contribute to the funds expired with it.

/s/ Freddie R. Linkous
Freddie R. Linkous

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Freddie R. Linkous.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993.

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF PALMER T. YATES

Palmer T. Yates, first being duly sworn, deposes and states as follows:

1. I am Palmer T. Yates and reside at Route 1, Box 305A, Clintwood, Virginia 24288.

2. I am president of Right Fork Coal Company, Inc., a Virginia corporation, engaged in the business of mining coal in Southwest Virginia.

3. Right Fork does not do any business in the District of Columbia or any state other than Virginia. The company is owned by me and members of my family.

4. All the contracts that Right Fork has had with the union have been made and negotiated in Virginia.

5. I thought that a company's liability to the funds was to be governed by its contract with the union and that once the contract expired the obligation to contribute expired with it.

6. The present contract that Right Fork has with the union was made on this understanding and expressly

exempts Right Fork from having to make payment to certain of the trust funds.

/s/ Palmer T. Yates
Palmer T. Yates

STATE OF VIRGINIA

COUNTY OF DICKENSON

Subscribed and sworn to before me this 5th day of May, 1993, by Palmer T. Yates.

/s/ Pamela C. Boothe
Notary Public

My commission expires: Feb. 28, 1995.

DOCKET NO 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED MINE WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF GARY O. BAKER

Gary O. Baker, first being duly sworn, deposes and states as follows:

1. I am Gary O. Baker and reside at Route 2, Box 66, Coeburn, Virginia 24230.

2. I am president of Ivy Branch Coal Company, a Virginia corporation.

3. Ivy Branch is engaged in the business of mining coal in Southwest Virginia and has one mine. The mine is presently shut down due to a roof fall. When the mine was operating, it employed twenty-three people.

4. Ivy Branch does not currently have any contract with the United Mine Workers. The last union contract Ivy Branch had expired in 1988.

5. Ivy Branch does not do any business in Washington, D.C. The company's only business is in Southwest Virginia.

6. I never heard of any "evergreen" clause or liability until this suit was filed. I thought that a company's

obligation to contribute to the funds expired when the contract expired.

/s/ Gary O. Baker
Gary O. Baker

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 5th day of May, 1993, by Gary O. Baker.

/s/ Phyllis S. Fields
Notary Public

My commission expires: June 30, 1993.

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF EDWARD A. ASBURY

The undersigned, having first being duly sworn, under penalty of perjury or false statement, does hereby state as follows:

1. I am Edward A. Asbury and reside at 602 Summit Ave., Bluefield, Virginia 24605.

2. I am President of San West Coal Co., Inc. ("San West") a Virginia corporation, headquartered in Virginia, but authorized to conduct business in West Virginia and conducting coal mining ooperations [sic] only in West Virginia.

3. San West does not do any business in the District of Columbia or any states other than West Virginia and Virginia.

4. All of the contracts that San West has had with the U.M.W.A. have been negotiated and made in West Virginia.

5. I thought that a company's liability to the Funds was to be governed by its contract with the Union, and that once the contract expired, the obligation to contribute expired with it.

6. The present contract that San West has with the Union was made on this understanding and expressly exempts San West from having to make payment to certain of the Trust Funds.

7. I relied upon the representations of the Union that the waiver of contributions to the 1950 Plans which I negotiated was valid and entered into the contract under that understanding; otherwise, I would not have signed the contract because economic conditions were so bad that I didn't think that San West could operate at a profit without the waiver.

8. None of the current or past employees of San West have every drawn any benefits or participated in any way in either the 1950 Benefit Plan or the 1950 Pension Plan, nor are any expected to in the future.

This the 18th day of May, 1993.

/s/ Edward A. Asbury
EDWARD A. ASBURY

Taken, subscribed and sworn to before the undersigned Notary Public, this the 18th day of May, 1993.

My Commission Expires: November 18, 1994.

/s/ Deborah C. Sarver
Notary Public,
Mercer County,
West Virginia

[SEAL]

DOCKET NO. 886

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE UNITED WORKERS OF AMERICA
EMPLOYEE BENEFIT PLANS LITIGATION

United Mine Workers of America 1974 Pension
Trust, et al v. Big Star Coal Co., et al
W.D. Virginia, No. 93-0031-A

AFFIDAVIT OF EDWARD A. ASBURY

The undersigned, having first being duly sworn, under penalty of perjury or false statement, does hereby state as follows:

1. I am Edward A. Asbury and reside at 602 Summit Ave., Bluefield, Virginia 24605.

2. I am President of Doss Fork Coal Company, Inc. a Virginia corporation, headquartered in Virginia, but authorized to do business in West Virginia and conducting coal mining operations only in West Virginia.

3. Doss Fork does not do any business in the District of Columbia or any states other than West Virginia and Virginia.

4. All of the contracts that Doss Fork has had with the U.M.W.A. have been negotiated and made in West Virginia.

5. I thought that a company's liability to the Funds was to be governed by its contract with the Union, and that once the contract expired, the obligation to contribute expired with it.

6. Doss Fork commenced mining operations in 1986 as a contract miner for Navaro Mining, Inc., which had obtained a waiver of contributions to the 1950 Benefit Trust from the U.M.W.A. for the benefit of its operations and Doss Fork separately entered into a labor contract with the Union at that time which contained a waiver of contributions to the 1950 Pension Trust.

7. In 1989 the Trustees of the 1950 Pension Trust and other trusts sued Doss Fork in the United States District Court for the Southern District of West Virginia for delinquent contributions (Civil Action No. 1:89-1151), and when collection of the Judgment obtained in that case was settled, the Trustees, by their attorney represented that the 1986 waiver of contributions to the 1950 Pension Trust was valid and would be recognized.

8. The present contract that Doss Fork has with the Union exempts Doss Fork from having to make payments to the U.M.W.A. 1950 Pension and Benefit Plans.

9. I relied upon the representations of the Union that the waiver of contributions to the 1950 Plans which I negotiated was valid and entered into the contract under that understanding; otherwise, I would not have signed the contract because economic conditions were so bad that I didn't think that Doss Fork could operate at a profit without the waiver.

10. None of the current or past employees of Doss Fork have ever drawn any benefits or participated in any way in either the 1950 Benefit Plan or the 1950 Pension Plan, nor are any expected to in the future.

This the 18th day of May, 1993.

/s/ Edward D. Asbury
EDWARD A. ASBURY

Taken, subscribed and sworn to before the undersigned Notary Public, this the 18th day of May, 1993.

My Commission Expires: November 18, 1994

/s/ Deborah C. Sarver
Notary Public,
Mercer County,
West Virginia

[SEAL]

BEFORE THE JUDICIAL PANEL
ON MULTI-DISTRICT LITIGATION

IN RE: UNITED MINE WORKERS OF AMERICAN EMPLOYEE BENEFIT PLANS LITIGATION	)))))	MDL DOCKET NO. 886

AFFIDAVIT OF JACK CHANDLER

Jack Chandler, having been duly sworn, deposes and states as follows:

1. I am Jack Chandler, Vice-President of Patty Chandler Trucking, Inc.

2. Patty Chandler Trucking, Inc. is owned by myself and my wife Patty Chandler.

3. Patty Chandler Trucking, Inc., ceased operations in September of 1991. Prior to that time, it hauled coal in Kentucky, and had no operations in the District of Columbia. The operations never involved more than 15 employees, and there were only 6 employees at the end of the operations in September of 1991.

4. Patty Chandler Trucking, Inc. has never had any employees who could be eligible for benefits under the UMWA 1950 Benefit Trust.

5. In 1988, Patty Chandler Trucking, Inc. entered into an agreement with the United Mine Workers of America under which the United Mine Workers agreed to waive any obligation to contribute to the UMWA 1950 Benefit Trust. Patty Chandler Trucking, Inc. relied on this

waiver in not making contributions to the 1950 Benefit Trust after 1988.

6. Prior to the recent demands for payment, I was not aware of any question about the validity of the waiver agreement and I had not heard of the "evergreen" clause. I have never seen the trust documents which are alleged to contain the "evergreen" clause.

7. All contracts that Patty Chandler Trucking, Inc. has made with the United Mine Workers were negotiated and signed by Patty Chandler Trucking, Inc. in Virginia.

8. Patty Chandler Trucking, Inc. has paid all sums for it owed under its 1988 agreement with the United Mine Workers, including payments to the UMWA 1974 Benefit Trust, the UMWA 1974 Pension Trust, and the UMWA 1950 Pension Trust.

9. Patty Chandler Trucking, Inc. has been assessed and paid withdrawal liability following the end of its operations.

/s/ Jack Chandler
JACK CHANDLER

STATE OF VIRGINIA

CITY OF BRISTOL

Subscribed and sworn to before me this 18th day of May, 1993, by Jack Chandler.

/s/ Donna D. Adams
Notary Public whose
commission expires 10-31-97

BEFORE THE JUDICIAL PANEL
ON MULTI-DISTRICT LITIGATION

IN RE: UNITED MINE WORKERS OF AMERICAN EMPLOYEE BENEFIT PLANS LITIGATION	))))	MDL DOCKET NO. 886

AFFIDAVIT OF BEVERLY MCKINNEY

Beverly McKinney, having been duly sworn, deposes and states as follows:

1. I am Beverly McKinney, Secretary of McKinney Trucking Co., Inc.

2. McKinney Trucking Co., Inc. is owned by myself and my husband Ed McKinney.

3. McKinney Trucking Co., Inc., hauls coal in Wise County, Virginia, and has no operations in any other state or in the District of Columbia. The operations never involved more than 3 union employes, and there are only 2 union employees at the present time.

4. McKinney Trucking Co., Inc. has never had any employees who could be eligible for benefits under the UMWA 1950 Benefit Trust.

5. In 1988, McKinney Trucking Co., Inc. entered into an agreement with the United Mine Workers of America under which the United Mine Workers agreed to waive any obligation to contribute to the UMWA 1950 Benefit Trust. McKinney Trucking Co., Inc. relied on this waiver in not making contributions to the 1950 Benefit Trust after 1988.

6. Prior to the recent demands for payment, I was not aware of any question about the validity of the waiver agreement and I had not heard of the "evergreen" clause. I have never seen the trust documents which are alleged to contain the "evergreen" clause.

7. All contracts that McKinney Trucking Co., Inc. has made with the United Mine Workers were negotiated and signed by McKinney Trucking Co., Inc. in Virginia.

8. McKinney Trucking Co., Inc. has paid all sums for it owed under its 1988 agreement with the United Mine Workers, including payments to the UMWA 1974 Benefit Trust, the UMWA 1974 Pension Trust, and the UMWA 1950 Pension Trust.

/s/ Beverly McKinney
BEVERLY MCKINNEY

STATE OF VIRGINIA

CITY OF BRISTOL

Subscribed and sworn to before me this 18th day of May, 1993, by Beverly McKinney.

/s/ Donna D. Adams
Notary Public whose
commission expires 10-31-97